No. 01-1763

Supreme Court, U.S.
FILED
AUG - 5 2002
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CALIFORNIA INTERSCHOLASTIC FEDERATION;
CALIFORNIA INTERSCHOLASTIC FEDERATION,
SOUTHERN SECTION, *Petitioners,*

v.

VICTOR BARRIOS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

BRIEF AMICI CURIAE OF CALIFORNIA, ALABAMA, HAWAII, NEBRASKA, NEVADA, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AND OHIO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
JAMES M. HUMES
Senior Assistant Attorney General
TAMMY CHUNG RYU
Supervising Deputy Attorney General
RICHARD T. WALDOW*
Deputy Attorney General
**Counsel of Record*
300 So. Spring St., Ste. 500 North Tower
Los Angeles, California 90013
(213) 897-2456
Counsel for Amici States
[Additional Counsel Listed On Inside Cover]

WILLIAM H. PRYOR JR.
Attorney General of Alabama
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130
(334) 242-7401

EARL I. ANZAI
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1500

DON STENBERG
Attorney General of Nebraska
Department of Justice
2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Nevada Attorney General's Office
100 North Carson Street
Carson City, Nevada 89701-4717
(775) 684-1100

ROBERT TENORIO TORRES
Attorney General of the Commonwealth of the Northern Mariana Islands
P.O. Box 1007
Saipan, MP 96950
(670) 664-2392

BETTY D. MONTGOMERY
Attorney General of Ohio
Ohio Attorney General's Office
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
(614) 466-8980

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
INTEREST OF AMICUS CURIAE STATE OF CALIFORNIA	2
STATEMENT OF THE CASE	3
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	4
I. The Court Should Grant Certiorari In Order to Resolve Conflicts Between CIF and Decisions of Other Circuits.	4
A. The CIF Opinion Has Created a Conflict Among the Circuits, as Well as Within The Ninth Circuit.	5
B. The CIF Opinion Completely Contradicts Buckhannon.	8
CONCLUSION	11

TABLE OF AUTHORITIES

	Page
Federal Cases	
American Disability Association v. Chmielarz 289 F.3d 1315 (11th Cir. 2002)	4
Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources 532 U.S. 598 (2001)	*passim*
California Interscholastic Federation v. Barrios 277 F.3D 1128 (9th Cir. 2002)	3-10
J.C., etc. v. Regional School District 10, etc. 278 F.3d 119 (2d Cir. 2002)	5
New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n 272 F.3d 154 (2d Cir. 2001)	6
Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Department of Energy 288 F.3d 452 (D.C. Cir. 2002)	6
Perez-Arellano v. Smith 279 F.3d 791 (9th Cir. 2002)	6-7
Smyth v. Rivero 282 F.3D 268 (4th Cir. 2002)	5
Rules of the Supreme Court	
Rule 37.4	1

IN THE

SUPREME COURT OF THE UNITED STATES

No. 01-1763

CALIFORNIA INTERSCHOLASTIC FEDERATION;
CALIFORNIA INTERSCHOLASTIC FEDERATION,
SOUTHERN SECTION, *Petitioners,*

v.

VICTOR BARRIOS, *Respondent.*

QUESTION PRESENTED

Does a purely private settlement agreement that 1) is not in the form of a consent decree, 2) is not incorporated in an order of dismissal, 3) does not require ongoing judicial supervision, and 4) merely extends jurisdiction on the district court to consider a subsequent motion for attorneys' fees, bear sufficient "judicial imprimatur" to justify conferring prevailing-party status on the plaintiff for purposes of federal fee-shifting statutes, notwithstanding Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health and Human Resources, 532 U.S. 598 (2001)?

INTEREST OF AMICI STATES

Amici curiae California, Alabama, Hawaii, Nebraska, Nevada, Commonwealth of the Northern Mariana Islands and Ohio (Amici States) respectfully file this brief in support of petitioner, pursuant to Rule 37.4 of the Rules of the Supreme Court of the United States.

Amici States, through their agencies and departments, are continuously engaged in litigation filed against them by private plaintiffs, who often seek an award of attorneys' fees and costs pursuant to various federal fee-shifting statutes. Fee awards that are awarded or included in settlements are paid from the States' treasuries.

In its recent decision in Buckhannon, this Court held that in order to qualify as a "prevailing party" and therefore be entitled to fees under federal fee-shifting statutes, a plaintiff who settles his action must show that the settlement bears the "imprimatur" of the court, i.e., that the relief came by and through the involvement, oversight and order of the court, not through the purely private agreement of the litigants. The plaintiff must achieve a "judicially sanctioned change in the legal relationship of the parties." Id. at 605. Thus, this Court struck down the "catalyst" theory, under which plaintiffs had been deemed prevailing parties on no other basis than that the lawsuit they filed led the defendant to voluntarily change its policies and procedures without a court order requiring it to do so. With respect to cases resolved by settlement, this Court held that a plaintiff may be deemed to be a prevailing party only if the settlement agreement is in the form of a consent decree or is incorporated in the court's order of dismissal. Id. at 604 n.7. Thus, while a state may negotiate a fee with plaintiffs, if it either declines or is unable to do so, the district court cannot issue an order requiring the state to pay the plaintiff's attorneys' fees unless the settlement bears the imprint of the court's action on the merits or requires continuing judicial enforcement of its terms.

Buckhannon is important to Amici States because it directly affects claims by litigants against the States' treasuries, and is applied and considered by the States in deciding whether and how to settle litigation against them, including and especially so-called "impact" litigation which results in changes to the States' policies and practices.

In the case at bar, California Interscholastic Federation v. Barrios, 277 F.3d 1128 (9th Cir. 2002) (hereinafter, "CIF"), however, one panel of the Ninth Circuit conferred prevailing-party status on a settling plaintiff despite the fact that the settlement was neither in the form of a consent decree nor incorporated into an order of dismissal. In so doing, the panel wrongly stated that the portion of Buckhannon imposing those requirements is mere dictum which it could, and therefore did, choose not to follow. It held instead that any private settlement agreement enforceable under the law of contracts is sufficient to render the plaintiff a prevailing party entitled to fees. That holding conflicts not only with decisions of three other Circuits that have interpreted and applied Buckhannon, but also with the decision of another panel of the Ninth Circuit itself. California and the other Amici States respectfully urge the Court to grant the petition for writ of certiorari to correct this disregard of Buckhannon, to resolve the conflict among the circuits and within the Ninth Circuit, and to clarify the law in this very important area.

STATEMENT OF THE CASE

Amici States adopt petitioner's statement of the case, with the exception of the following sentence in the last paragraph thereof: "This represents a very narrow construction of Buckhannon."

INTRODUCTION AND SUMMARY OF ARGUMENT

Certiorari is necessary in order to resolve a conflict among the circuits on an important issue of law.

The very essence of Buckhannon is that a party does not truly "prevail," and thereby become entitled to a fee award under the fee-shifting statutes, unless it obtains relief by and through the direct involvement of the court. The requisite judicial imprimatur or oversight cannot be supplied post hoc merely by including in a purely private settlement agreement a provision reserving jurisdiction in the court to decide any future motion for fees. By holding otherwise, CIF contradicts Buckhannon and creates a conflict among the circuits which this Court should resolve.

ARGUMENT

I. The Court Should Grant Certiorari in Order to Resolve Conflicts Between CIF and Decisions of Other Circuits.

The Ninth Circuit mislabeled as dictum an important ruling in Buckhannon, and explicitly chose to disregard that ruling. Unless it is reversed, CIF will eviscerate Buckhannon's holding and effect with respect to settlements. And the CIF opinion does more than conflict with Buckhannon. It has created other conflicts as well. It has created a split between the Ninth Circuit and three other circuits which have recently interpreted and applied Buckhannon in the context of settlement agreements, a conflict which the Eleventh Circuit recently noted in American Disability Association v. Chmielarz, 289 F.3d 1315, 1319 n.2 (11th Cir. 2002). The CIF decision has also created a split within the Ninth Circuit itself.

A. The CIF Opinion Has Created a Conflict Among the Circuits, as Well as Within the Ninth Circuit.

Three circuit courts of appeals have interpreted and applied Buckhannon contrary to the CIF panel. In Smyth v. Rivero, 282 F.3d 268 (4th Cir. 2002), a case which is particularly relevant to the case at bar, the Fourth Circuit reversed a fee award because the plaintiffs were not prevailing parties on the basis of a private settlement agreement. Carefully reviewing and relying on Buckhannon, the Fourth Circuit ruled that the settlement agreement was not sufficient to confer prevailing-party status because its terms were not incorporated into a court order and there was no provision retaining the court's jurisdiction to enforce its terms. Whether or not the settlement agreement was enforceable under contract law was irrelevant to this determination.

The Fourth Circuit took particular note of the fact that, in Buckhannon, this Court distinguished its rulings regarding settlements as a basis for prevailing-party status from dicta in its previous opinions which might have suggested that purely private settlements could support prevailing-party status. Smyth v. Rivero, 282 F.3d at 279. In other words, the Fourth Circuit interpreted and applied footnote 7 of Buckhannon, 532 U.S. at 604 n.7, and other statements in the opinion consistent with footnote 7, as a holding.

Likewise, in J.C., etc. v. Regional School District 10, etc., 278 F.3d 119 (2d Cir. 2002), the Second Circuit interpreted and applied Buckhannon's statements regarding settlement agreements as a holding. The Second Circuit stated that in Buckhannon, this Court "*held* that, to be a prevailing party, one must either secure a judgment on the merits or be a party to a settlement agreement that is expressly enforced by the court through a consent decree." Id. at 123 (emphasis added). In response to the plaintiff's argument that plaintiff had obtained a change in the legal relationship between the parties, the Second Circuit stated that, even if he had, "this change was not

judicially sanctioned, as required by Buckhannon." Id. at 125; see also New York State Federation of Taxi Drivers, Inc. v. Westchester County Taxi & Limousine Comm'n, 272 F.3d 154, 158-59 (2d Cir. 2001) (reversing a fee award where the parties entered into a private settlement and the district court entered an order dismissing the case as moot).

Similarly, in Oil, Chemical and Atomic Workers Int'l Union, AFL-CIO v. Department of Energy, 288 F.3d 452 (D.C. Cir. 2002), the D.C. Circuit reversed a fee award pursuant to Buckhannon, ruling that the plaintiff was not made a prevailing party by a settlement and subsequent court order which dismissed the case and reserved plaintiff's right to obtain a fee award. Reviewing Buckhannon, the D.C. Circuit held that the order did not constitute judicial relief to the plaintiff or any action by the court altering the legal relationship of the parties. Id. at 458.

Each of these opinions conflicts with CIF's holding that, even under Buckhannon, a plaintiff is a prevailing party as long as the settlement agreement between the parties is enforceable under contract law.

CIF even conflicts with a recent decision by another panel of the Ninth Circuit itself. In Perez-Arellano v. Smith, 279 F.3d 791 (9th Cir. 2002), the Ninth Circuit was considering whether the holding in Buckhannon was limited to the particular federal fee-shifting statutes at issue in that case. In concluding that it does not, the court not only reiterated that the language in Buckhannon regarding settlements was a holding, but the panel itself held that in order to be a "prevailing party" under federal fee-shifting statutes, by virtue of a settlement, the settlement must result in a court-ordered consent decree: "We therefore *hold* that a 'prevailing party' under the EAJA must be one who has gained by judgment *or consent decree* a 'material alteration of the legal relationship of the parties.'" Id. at 794-95, quoting Buckhannon, 121 S.Ct. at 1840 (emphasis added).

Applying this rule to the facts before it, the Perez-Arellano panel then concluded that the plaintiff in that case was not a "prevailing party" because,

> Perez-Arellano unmistakably did not gain a change in his legal relationship with the INS by judgment *or consent decree. Under the standard set in Buckhannon*, and adopted by us as the rule of decision to interpret the term 'prevailing party' in the EAJA, Perez-Arellano does not qualify as a 'prevailing party' for purposes of an award of attorney's fees.

Id. at 795 (emphasis added).

After issuing its opinion in Perez-Arellano, the Ninth Circuit panel slightly modified it by deleting one additional acknowledgment that the portions of the Buckhannon opinion regarding settlements constitute a holding, and by making two other slight modifications which downplayed that point. One of the other changes was to add a footnote, 279 F.3d at 795 n.5, in which the court sought to harmonize its opinion with CIF. The court noted that because no settlement agreement is involved in the Perez-Arellano case, it did not need to address whether the plaintiff would have qualified for prevailing-party status under the rules pertaining to settlements. More significant than that disclaimer, however, is the fact that the Perez-Arellano panel left undisturbed all the other acknowledgments of the Buckhannon holding regarding settlements mentioned above.

Certiorari is necessary in order to resolve all the conflicts created, both within and without the Ninth Circuit, by the CIF opinion.

B. The CIF Opinion Completely Contradicts Buckhannon.

In Buckhannon, this Court held that a plaintiff does not become a "prevailing party" entitled to a fee award just because the suit acted as a "catalyst" for legislative change. In addition, in footnote 7, this Court stated that a plaintiff who is a party to a private settlement agreement does not become a "prevailing party," and thus entitled to fees under federal fee-shifting statutes, unless the settlement is in the form of a consent decree or incorporated into the court's order of dismissal. Buckhannon, 532 U.S. at 604, n.7. This Court held that a settlement cannot serve as the basis for fees unless it reflects the court's "imprimatur," i.e., the court's oversight or order.

The settlement in CIF fails to meet that requirement. It was not a consent decree and was not incorporated into the dismissal order. The district court considered and denied Barrios' motion for fees, prior to the issuance of Buckhannon. Applying the standards in effect before Buckhannon, the district court ruled that Barrios was not a prevailing party because (1) his technical victory was insignificant compared to the relief he originally sought, including broad policy changes, and (2) the relief he obtained for himself had been granted prior to the filing of the complaint and was not the result of the litigation. CIF, 277 F.3d at 1135.

The Ninth Circuit panel in CIF reversed the denial of Barrios' motion for fees. In so doing, the panel contended that footnote 7 of Buckhannon was merely dictum, and explicitly declined to follow it. Id. 277 F.3d at 1135 n.5. The panel essentially held that any private settlement agreement which is enforceable under the law of contracts will serve as a basis for prevailing-party status and thus a fee award, even without a court order incorporating the agreement or retaining jurisdiction to enforce it. It thus awarded prevailing-party status to Barrios, even though his private settlement agreement was not in the form of a consent decree, was not incorporated

into the district court's dismissal order, and did not provide for continuing judicial enforcement of its terms.

It is clear, contrary to CIF, that footnote 7 of the Buckhannon opinion is not dictum. It is part-and-parcel of this Court's holding, rationale and mandate in that case. It applies this Court's rationale that a plaintiff is not a prevailing party unless the settlement is the product of judicial action and involvement or requires judicial oversight and continuing involvement with respect to future compliance or execution of the substantive settlement terms. Nor is the CIF opinion an alternative construction of Buckhannon; it is inconsistent with it, because it would entitle a settling plaintiff to an order for attorneys' fees notwithstanding the fact that the settlement does not bear the degree of judicial involvement or oversight that this Court has stated is required for such an order to be issued.

The Ninth Circuit implicitly acknowledged this when, in a sideways nod to Buckhannon, it stated that "sufficient judicial oversight" of the settlement had been provided because the settlement agreement stated that the district court would retain jurisdiction to decide any motion for attorneys' fees which might be made later. CIF, 277 F.3d at 1134 n.5. However, it is clear from Buckhannon that this is nowhere near the kind of judicial oversight or "imprimatur" required by this Court to justify an award of attorneys' fees. That degree of judicial involvement or oversight cannot be supplied merely by reserving the right to have the court determine a fee motion based on a settlement that itself is not the product of judicial involvement or does not require continuing judicial oversight.

The Ninth Circuit's decision in CIF, therefore, does more than simply conflict with Buckhannon; it would effectively eviscerate it. If, as the CIF court held, any private settlement agreement enforceable under the law of contracts is a sufficient basis for prevailing-party status under federal fee-shifting statutes, then every private settlement will meet that test. Any valid settlement agreement is, per se, enforceable as a contract.

If CIF is not overturned, Amici States' taxpayers will be exposed to liability for the fees of plaintiffs' attorneys, even though the plaintiffs might not have obtained a judgment in their favor or a settlement in the form of a consent decree or other court order. That is clearly not the result effected or intended by this Court in Buckhannon.

Those courts that have properly followed Buckhannon understood that the opinion's application to purely private settlement agreements does not adversely affect the public interest. Private plaintiffs who bring meritorious cases, including cases that seek changes in government policies and practices, retain their ability to collect fees. In such cases, they can either negotiate a fee payment, utilizing the strength of their case as leverage, or pursue the litigation to judgment and collect fees.

Amici States recognize that there are situations in which they promote the public interest by making changes in their policies and practices, and that litigation against the States challenging those policies and practices may sometimes lead to such changes. Amici States believe, however, that responsible government entities appreciate the obligations imposed upon them under fee-shifting statutes. They will consider the equities in situations wherein plaintiffs truly serve as catalysts for change, and they will and do attempt to negotiate a fee with plaintiffs. At the same time, any negotiated fee will be tempered by the amount and degree of success or change plaintiffs have caused by litigation. Responsible government parties can best assess whether the litigation or some other factor (such as legislative pressure or other litigation) has most directly forged a change in policy or behavior. Buckhannon properly leaves that determination to the government defendant.

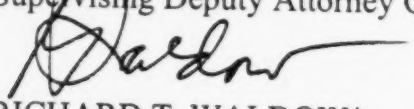
CONCLUSION

As this Court correctly recognized in Buckhannon, in order for the district court to award attorneys' fees against a settling defendant under federal fee-shifting statutes, the plaintiff must obtain relief against the defendant by and through the action of the court. The Ninth Circuit's decision at bar runs counter to Buckhannon insofar as settlements are concerned and has created conflicts with other Circuits. For the reasons stated above, the Amici States respectfully urge the Court to grant the petition for certiorari.

Dated: August 1, 2002

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
MANUEL M. MEDEIROS
State Solicitor General
JAMES M. HUMES
Senior Assistant Attorney General
TAMMY CHUNG RYU
Supervising Deputy Attorney General



RICHARD T. WALDOW*
Deputy Attorney General
*Counsel of Record

Counsel for Amici States